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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-605

32436

In re Applications of)	MM DOCKET NO. 93-107
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC
For Construction Permit for)	
an FM Station on Channel 280A,)	
in Westerville, Ohio)	

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FCC MAIL SECTION
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MEMORANDUM OPINION AND ORDER

Issued: September 20, 1993 ; Released: September 22, 1993

1. Ohio Radio Associates (ORA) seeks a ruling on a "Motion to Enlarge Against ASF Broadcasting Corporation." They filed that motion on August 20, 1993 and wants both a financial and a financial misrepresentation issue specified against ASF. ASF opposed ORA's motion on September 7, 1993, and ORA replied on September 17, 1993.

Preliminary Ruling

2. ORA's enlargement request is late-filed. Timely motions to enlarge should have been filed on or before May 24, 1993. See 47 CFR 1.229(b)(2) and 58 F.R. 21580 published April 22, 1993.

3. ORA argues that its motion is timely since it "... is based on the deposition testimony of Ardeth S. Frizzell, a shareholder of ASF, and is filed within fifteen (15) days of receipt of the deposition transcripts. . ." ¹

4. That argument is rejected. ORA has had since December 30, 1991, to garner and firm up their financial allegations against ASF. In any event, ASF amended its application as a matter of right on March 5, 1992. The information that ORA relies on was available to ORA then. Moreover, automatic document production took place on May 10, 1993. So even if ORA hadn't done its homework in 1992, there is no excuse for not having their financial allegations firmed up by June 9, 1993. ORA's motion is tardy in the extreme.

¹ ORA's pleading contains no specific dates. So it is impossible to verify whether their timeliness assertion can even be analyzed, let alone credited.

5. A party has no right to wait until after depositions are taken before moving to enlarge issues against their opponent(s). In fact the Commission has specifically admonished them not to do so. See Discovery Procedures, 12 FCC 2d 185 (1968) at para 7. This tactic of waiting until after discovery has been completed before moving to enlarge the issues is a procedure that should be discouraged. It prolongs hearings and frequently leads to two-phase or even three-phase hearings.^{2/3}

Ruling

6. Since ORA's motion is untimely, their allegations must be analyzed under the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-Regulation Proposals, 58 FCC 2d 865 (1976) and 47 CFR 1.229(c). There (at 873-874) the Commission said this:

"...An untimely motion to enlarge will be considered fully on its merits only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

7. Giving ORA's allegations the strict construction they deserve they fail to pass muster. ORA erroneously asserts that there were no written cost estimates at the time the application was certified. This erroneous assertion doesn't qualify as a question of probable decisional significance. Nor can it

² ORA didn't file their enlargement request against ASF until four days after the exhibits had been exchanged, and on the day the Evidentiary Admission Session was held. So ORA is obviously fishing for a Phase II hearing.

³ At the present time the adjudicatory processors (the Trial Judges, the Review Board, and the Adjudication Division of the General Counsel's office) are giving untimely post-designation petitions to enlarge issues the run-of-the-mill treatment. We seldom analyze such petitions as they should be analyzed; i.e., akin to an infrequent request for extraordinary relief. Consequently, the filing of untimely post-designation enlargement petitions has become a routine, almost automatic ritual. Thus, we end up squandering judicial system resources, fostering adjudicatory inefficiency, and sanctioning trial by ordeal.

Our nonchalant processing of untimely enlargement requests obviously accrues to the tactical advantage of the RAMBO litigator. It permits him to delay the outcome of the proceeding, and it gives him an additional bargaining chip at the settlement table.

Moreover, it must be remembered that granting an untimely petition to enlarge changes the basic fabric of the proceeding, reshapes the litigation, and alters the strengths and weaknesses of the parties involved. Adjudicatory processors would do well to give untimely enlargement requests the proverbial "hard look" before granting or denying them.

doesn't qualify as a question of probable decisional significance. Nor can it be said the assertion raises any question of such substantial importance that they warrant a Phase II hearing.

8. Even assuming ORA's allegations were timely, they would still be rejected for either of two reasons. First, and since their allegations are financial allegations, they must meet the standard the Commission laid down in Revised Processing Applications, 72 FCC 2d 202 (1979) at 222 (para.60). This record shows that ASF faces \$90,000 in construction and operation expenses. They have \$208,000 available to meet those construction and operation expenses. Thus, ORA has failed to show that ASF has misrepresented their finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective.

9. Secondly, and even applying 47 CFR 1.229(d)'s less stringent standards ⁴, ORA hasn't pleaded with the required sufficiency and specificity to warrant adding the issues they seek. In fact, the opposite is true. The record shows that ASF made a good faith attempt to budget the costs of construction and operation of their station and they are financially qualified to follow through on their proposal.

SO the "Motion to Enlarge The Issues Against ASF" that Ohio Radio Associates filed on August 20, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

⁴ 47 CFR 1.229(d) governs timely motions to enlarge. It provides in pertinent part that "[s]uch motions shall contain specific allegations of fact sufficient to support the action requested."